



SMALL BUSINESS ADMINISTRATION

13 CFR Part 125

RIN 3245-AH28

National Defense Authorization Act of 2020, Credit for Lower Tier Subcontracting and Other Amendments

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) is proposing to amend its regulations to implement provisions of the National Defense Authorization Act for Fiscal Year 2020. The proposal would permit a prime contractor with an individual subcontracting plan to apply credit for subcontracts to small businesses at lower tiers toward its subcontracting goals. To do so, the prime contractor would incorporate the lower-tier subcontracting performance into its subcontracting-plan goals.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3245-AH28, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.
- Email: Roman Ivey, Program Analyst, Office of Policy Planning and Liaison, Small Business Administration, at Roman.Ivey@sba.gov.

SBA will post all comments on <https://www.regulations.gov>. If you wish to submit confidential business information (CBI), as defined in the User Notice at <https://www.regulations.gov>, please submit the information to Roman Ivey, Small Business Administration at Roman.Ivey@sba.gov. Highlight the information that you

consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Roman Ivey, Program Analyst, Office of Policy Planning and Liaison, Small Business Administration, at Roman.Ivey@sba.gov, (202) 401-1420. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION:

Background

The SBA proposes to revise its Small Business Subcontracting Plan regulations in 13 CFR 125.3 in response to changes made in section 870 of the National Defense Authorization Act (NDAA) of 2020, Public Law 116-92. Specifically, section 870 made changes to section 8(d) of the Small Business Act, 15 U.S.C. 637(d), regarding the requirements that apply to a Federal contractor seeking to obtain subcontracting credit on certain types of Federal contracts.

Most Federal contracts require the awardee to enter into a subcontracting plan that includes percentage goals for using small businesses and subcategories of small businesses. Subcontracting plans apply to Federal contracts exceeding \$750,000 (\$1.5 million for construction), unless the awardee is a small business, the contract does not offer subcontracting opportunities, or the contract will be performed entirely outside the United States and its outlying areas. Prior to SBA's Final Rule published on December 23, 2016, 81 FR 94246, SBA's regulations permitted a prime contractor to count only its first-tier subcontracts toward the goals in its subcontracting plan. The December 2016 Final Rule, however, mandated that prime contractors receive credit for lower-tier subcontracts under certain circumstances. Section 870 changed the criteria for receiving

credit for lower-tier subcontracting, and this proposed rule implements those statutory changes.

Section 870 made three changes to subcontracting plan requirements. First, a prime contractor may elect, in some instances, to receive credit toward its subcontracting plan for lower-tier subcontracts to small businesses. Second, agencies are prohibited from setting tier-specific goals for prime contractors that use lower-tier credit. Third, subcontracting plans are required to recite the records that contractors will maintain to substantiate lower-tier credit.

These changes require SBA to change some of the provisions set forth in the December 2016 Final Rule. Most importantly, relying on statutory language, the December 2016 Final Rule made it mandatory for contractors with individual subcontracting plans to take credit for lower-tier subcontract. Section 870, by contrast, removes the mandate and states that prime contractors “may elect to receive credit” for either first-tier subcontracts on their own, or subcontracts at any tier. Accordingly, SBA proposes to change the prior mandate to an election.

Additionally, the December 2016 Final Rule allowed for contractors to receive credit for subcontracts awarded to small businesses below the first tier, but only where the contractor had two sets of subcontracting goals. A contractor was required to have a goal for small-business subcontracting at the first tier, and an additional goal for small business subcontracting at lower tiers. Section 870 prohibits agencies from setting tier-specific goals for prime contractors that use lower-tier credit. To address that statutory change, SBA proposes that prime contractors will only have one set of subcontracting goals. Prime contractors may elect under certain circumstances to have subcontracts awarded to small businesses at lower tiers counted toward this goal.

This proposed rule also implements the requirement from section 870 that contractors include in their subcontracting plans a statement of the types of records they will maintain to substantiate subcontracting credit.

Section 870 further created a new subparagraph 8(d)(16)(B) in the Small Business Act, 15 U.S.C. 637(d)(16)(B), to require agencies to collect, report, and review data on compliance with subcontracting plans. The new subparagraph duplicates existing statutory language in section 8(d)(7) of the Small Business Act, 15 U.S.C. 637(d)(7), and has already been implemented in SBA's regulations at 13 CFR 125.6(f)(8). Therefore, no regulatory changes are necessary to implement new subparagraph 8(d)(16)(B).

Section-by-Section Analysis

13 CFR 125.3(a)

SBA proposes to change the threshold for a required subcontracting plan to \$750,000. This would make the threshold consistent with the Federal Acquisition Regulation (FAR) subpart 19.7 and with other references to the threshold in section 125.3.

13 CFR 125.3(a)(1)(i)(C)

SBA proposes to revise the language of 13 CFR 125.3(a)(1)(i)(C) to incorporate the two statutory changes from section 870 that differ from SBA's December 2016 rule: creating an election for using lower-tier subcontracting credit and prohibiting more than one set of goals.

First, the proposed language makes lower-tier subcontracting credit discretionary, in some circumstances. A prime contractor may elect to take credit for lower-tier subcontractors only when the subcontracting plan applies to a single contract with one Federal agency. In other situations—i.e., where the plan applies to more than one contract or to a single contract with more than one agency—section 870 prohibits the prime contractor from receiving credit for lower-tier subcontracting. Commercial plans and

comprehensive subcontracting plans therefore are not eligible to use lower-tier subcontracting credit. They must instead rely solely on first-tier subcontracts. Additionally, governmentwide contracts and multi-agency contracts are not permitted to use lower-tier subcontracting credit.

Where a prime contractor elects to include lower-tier subcontracts towards its goal, the prime contractor would be credited with lower-tier subcontracts that are reported under lower-tier subcontracting plans. This proposed rule does not require prime contractors to submit additional reports. Prime contractors would be required to report only their first-tier awards. Lower-tier subcontracting awards are required to be reported by the prime contractor's lower-tier subcontractors in accordance with their subcontracting plans and SBA's regulations. SBA believes that only having each subcontract at any tier reported once will help prevent duplicative counting of the same awards.

Second, the proposed rule eliminates the prior provision that a prime contractor would have two sets of subcontracting goals—one for the first tier and one for lower tiers. Instead, SBA proposes that the prime contractor would incorporate the subcontracting-plan goals of its lower-tier subcontractors into its individual-subcontracting-plan goals.

13 CFR 125.3(c)

SBA proposes to create a new 13 CFR 125.3(c)(1)(xii) to incorporate the new recordkeeping requirements on contractors with subcontracting plans. Specifically, prime contractors are required to maintain records of the procedures used to substantiate the credit they elect to receive for lower-tier subcontracting under 13 CFR 125.3(a)(1)(i)(C).

Compliance with Executive Orders 12866, 13563, 12988, 13175, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), the Regulatory Flexibility Act (5 U.S.C. 601-612), and the Congressional Review Act (5 U.S.C. 801-808).

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is not a significant regulatory action for the purposes of Executive Order 12866.

Executive Order 13563

SBA previously solicited comments from the public on a proposal to provide credit for lower-tier subcontracting. 80 FR 60300. Those comments were considered for this rulemaking. Additionally, as part of its ongoing efforts to engage stakeholders in the development of its regulations, SBA has solicited comments and suggestions from procuring agencies on how to best implement section 870. SBA has incorporated those comments and suggestions to the extent feasible. SBA intends to incorporate, where feasible, public input into the final rule.

Executive Order 12988

For purposes of Executive Order 12988, SBA has drafted this proposed rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of that Executive Order, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

Executive Order 13175

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that this proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and

responsibilities among the various layers of government. Therefore, SBA has determined that this proposed rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

This rule, if adopted in final form, would update the requirements for small business subcontracting plans to add a requirement for prime contractors to include in their subcontracting plans a statement of the types of records they will maintain to substantiate subcontracting credit. The FAR rule implementing this requirement will account for this information collection, and clearance for the information collection will be obtained by the FAR Council.

Regulatory Flexibility Act, 5 U.S.C. 601-612

According to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, when an agency issues a rulemaking, it must prepare a regulatory flexibility analysis to address the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines "small entity" to include "small businesses," "small organizations," and "small governmental jurisdictions." This proposed rule concerns various aspects of SBA's contracting programs. As such, the rule relates to small business concerns, but would not affect "small organizations" or "small governmental jurisdictions" because those programs generally apply only to "business concerns" as defined by SBA regulations, in other words, to small businesses organized for profit. "Small organizations" or "small governmental jurisdictions" are non-profits or governmental entities and do not generally qualify as "business concerns" within the meaning of SBA's regulations.

There are approximately 350,000 concerns registered as small business concerns in the System for Award Management (SAM) that could potentially be impacted by the

implementation of section 870. However, SBA cannot say with any certainty how many will be impacted because we do not know how many of these concerns participate in government contracting as subcontractors. A firm is required to register in SAM in order to participate in Federal contracting as a prime contractor, but not for purposes of subcontracting. Therefore, there are no known compliance or other costs imposed by the proposed rule on small business concerns.

In sum, the proposed amendments would not have a disparate impact on small businesses and would increase their opportunities to participate in Federal Government contracting as subcontractors without imposing any additional costs. For the reasons discussed, SBA certifies that this proposed rule would not have a significant economic impact on a substantial number of small business concerns.

Congressional Review Act (5 U.S.C. 801–808)

The Congressional Review Act, 5 U.S.C. 801 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a “major rule” may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. SBA will submit a report containing this rulemaking and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the Federal Register. This rulemaking has been reviewed and determined by OMB not to be a “major rule” under 5 U.S.C. 804(2).

List of Subjects in 13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Small business subcontracting.

For the reasons stated in the preamble, SBA proposes to amend 13 CFR part 125 as follows:

PART 125--GOVERNMENT CONTRACTING PROGRAMS

1. The authority citation for 13 CFR part 125 is revised to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657f, 657q, 657r, and 657s; 38 U.S.C. 501 and 8127.

2. Amend § 125.3 by:

- a. Removing the number “\$650,000” in paragraph (a) introductory text and adding in its place the number “\$750,000”;

- b. Revising paragraph (a)(1)(i)(C);

- c. Removing the word “and” after the semicolon at the end of paragraph (c)(1)(xi);

- d. Redesignating paragraph (c)(1)(xii) as paragraph (c)(1)(xiii); and

- e. Adding a new paragraph (c)(1)(xii).

The revision and addition read as follows:

§ 125.3 What types of subcontracting assistance are available to small businesses?

(a) * * *

(1) * * *

(i) * * *

(C) Where the subcontracting goals pertain only to a single contract with one Federal agency, the contractor may elect to receive credit for small business concerns performing as first-tier subcontractors or subcontractors at any tier pursuant to the subcontracting plans required under paragraph (c) of this section in an amount equal to the dollar value of work awarded to such small business concerns. The election must be recorded in the subcontracting plan. If the contractor elects to receive credit for subcontractors at any tier, the following requirements apply:

(1) The prime contractor must incorporate the subcontracting-plan goals of their lower-tier subcontractors in its individual-subcontracting-plan goals.

(2) To receive credit for their subcontracting, lower-tier subcontractors must have their own individual subcontracting plans.

(3) The prime contractor and any subcontractor with a subcontracting plan are responsible for reporting on subcontracting performance under their contracts or subcontracts at their first tier. This reporting method applies to both individual subcontracting reports and summary subcontracting reports.

(4) The prime contractor's performance under its individual subcontracting plan will be calculated by aggregating the prime contractor's first-tier subcontracting achievements with the achievements of the prime contractor's lower-tier subcontractors that have flow-down subcontracting plans.

(5) If the subcontracting goals pertain to more than one contract with one or more Federal agencies, or to one contract with more than one Federal agency, the prime contractor shall only receive credit for first tier subcontractors that are small business concerns. This restriction applies to all commercial plans, all comprehensive subcontracting plans with the Department of Defense, governmentwide contracts, and multi-agency contracts.

* * * * *

(c) * * *

(1) * * *

(xii) The prime contractor must provide a written statement of the types of records it will maintain to demonstrate that procedures have been adopted to substantiate the subcontracting credit that the prime contractor elects under paragraph (a)(1)(i)(C) of this section; and

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Isabella Casillas Guzman,
Administrator.

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